No. 90-1142

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF NEW JERSEY, Petitioner,

v.

NATHANIEL HARVEY, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

I, Nathaniel Harvey, being duly sworn according to law, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost or proceeding in this Court are true.

1. Are you presently employed?

NO

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?

NO

3. Do you own any cash or checking or savings account?

NO

4. Do you own any real estate, stock, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothings)?

NO

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NO

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

NATHANIEL HARVEY

Subscribed and Sworn to before me
this day of , 1991.

QUESTION PRESENTED

Whether this Court has jurisdiction or should exercise jurisdiction to review a decision of the New Jersey Supreme Court which is alternatively and plainly based on an adequate and independent state ground?

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No. 90-1142

STATE OF NEW JERSEY, Petitioner,

v.

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PETITION FOR WRIT OF CERTIORARI TO
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BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

Respondent, Nathaniel Harvey, respectfully submits that a writ of certiorari to review the judgment and opinion of the New Jersey Supreme Court in State v. Harvey, 121 N.J. 407, 581 A.2d 483 (1990), is unnecessary and should not issue.

The New Jersey Supreme Court reversed the defendant's capital murder conviction and ruled that his confession could not be introduced at his retrial. The court relied on its previous decision in State v. Hartley, 103 N.J. 252, 511 A.2d 80 (1986), which established as a matter of state law a bright line rule that "failure to readminister Miranda warnings before interrogation an accused who has previously invoked the right to silence will invariably result in a finding that the right has not been scrupulously honored." 103 N.J. at 279, 511 A.2d at 94.

The New Jersey Supreme Court did not reach Mr. Harvey's contention that his confesson was involuntary. 121 N.J. at 425, 581 A.2d at 491 (App. A at 15)

OPINIONS BELOW

The opinion of the New Jersey Supreme Court is reported at 121 N.J. 407, 581 A.2d 483 (1990).

STATEMENT OF THE CASE

Nathaniel Harvey was charged by Middlesex County Indictment Number 568-11-85 with the June 1985 murder of Irene Schnapps in Plainsboro, New Jersey.

On October 28, 1985, Nathaniel Harvey was arrested in West Windsor Township on unrelated charges of kidnapping and burglary. He remained in police custody and was questioned about several crimes including the murder of Irene Schnapps.

On the morning of October 30, 1985, Harvey was arraigned in the Mercer County Court House before 10:00 a.m. At 10:15 a.m. Detectives Rizzo and Zimmerman of the Middlesex County Prosecutor's Office arrived at the Mercer County jail. They came to interrogate Harvey but whether he was advised of his Miranda rights during this session is unclear. Rizzo initially testified that Harvey was not advised of his rights, though he subsequently maintained that the Miranda card Harvey signed the previous evening was read to him. Rizzo's report does not mention that Harvey was advised at this morning session. (T 38-2 - Sept. 15); (T 46-5 - Sept. 15) Rizzo's testimony, and report, however were clear with respect to what Harvey told the detectives. Harvey said "I'll tell you about the murder but first I want to see my father." (T 14-1 to 15-20 - Sept. 15) They "stopped talking to him," (T 14-10 - Sept. 15), and arranged for Harvey's father to be brought to the jail. However, while waiting the two hours it took to bring defendant's father, the detectives sat with Harvey and "spoke about things in general." (T 14-15 - Sept. 15)

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Investigator Baez of the Middlesex County Prosecutor's Office picked up Robert Harvey at his job, and brought him to the jail. Arrangements were made for father and son to speak at the Mercer County Prosecutor's Office. At 2:15 p.m. they finally had the opportunity to be alone, and spoke to one another for 15 to 20 minutes. (T 35-7 to 21 - Sept. 15) Nathaniel Harvey told his father that he did not commit the murder he was being questioned about, (T 43-6 - Sept. 16), and that the police at West Windsor Headquarters had hit him a few times. His father saw bruises on his son's face. (T 42-17 - Sept. 10) Nathaniel Harvey had previously told Detective Smith that he had been struck by the police. (T 134-13 - Sept. 12)

As Robert Harvey came out of the room his son was being held in, Rizzo and Zimmerman entered. They asked for the details of the murder, without providing any Miranda warning, not even a "reminder," and were given information and answers about the crime for the next 40 minutes. (T 15-25 to 16-25; T 36-1 to 25 - Sept. 15) No simultaneous record of this confession was made, so the detectives arranged to move into a room with a word processing operator who was instructed to type an interrogation. It, however, proceeded only as far as the Miranda warnings because Harvey requested a lawyer. (T 39-22 - Sept. 15) So the detectives arranged to return Harvey to the County Jail, and five days

In his appeal which was decided by the New Jersey Supreme Court, defendant asserted both that his statements were involuntary and that they were obtained after the police failed to scrupulously honor his assertion of his right to remain silent in violation of the rule set forth in State v. Hartley, 103 N.J. 252, 511 A.2d 80 (1986). The New Jersey Supreme Court held that the Hartley rule did bar the introduction of the defendant's confession and that the court need not consider defendant's claim that his confusion was involuntary. 121 N.J. at 425, 581 A.2d at 491. (App. A. at 15)

SUMMARY OF ARGUMENT

Because the decision of the New Jersey Supreme Court is plainly based on a bona fide adequate and independent state ground, this Court should deny the petition. The decision of the New Jersey Supreme Court also correctly applies federal constitutional law to the facts of the present case and does not present an important question of federal law which has not been but should be settled by the United States Supreme Court.

REASONS FOR DENYING THE WRIT

I. THIS COURT MUST DECLINE JURISDICTION BECAUSE THE NEW JERSEY SUPREME COURT DECISION IS CLEARLY SUPPORTED BY ADEQUATE AND INDEPENDENT STATE GROUNDS.

There is nothing ambiguous about the intention of the New Jersey Supreme Court to rely upon state law as an alternative basis for its decision in this case and in its decision in State v. Hartley, 103 N.J. 252, 511 A.2d 80 (1983), which is the basis for its decision to suppress Mr. Harvey's confession. The prosecutor does not contend that either the Hartley decision or the Harvey decision does not contain a plain statement that its decision rests upon adequate and independent state grounds. What the prosecutor does contend, however, is that the New Jersey Supreme Court is being deceitful, is engaged in a sham and is wrong in its decision on a question of state law. (SP 19) The prosecutor's argument is nothing less than an assault on the authority of the New Jersey's court to interpret its own state law.

The plain statement rule of Michigan v. Long 463 U.S. 1032, 1042 (1983) was recently reiterated and explained in Harris v. Reed, 489 U.S. 225, 109 S.Ct. 1038 (1989). The Reed decision held that the Michigan v. Long plain statement rule applied in cases on Federal habeas review as well as in cases on direct review in the Supreme Court. Id. at 103 S.Ct. 1040. The Reed decision explained that the Michigan v. Long rule was formulated to avoid difficulties that occur due to ambiguity in the state

court's opinion. The Reed decision explained that the Supreme Court:

> long has held that it will not consider an issue of federal law on direct review from a judgement of a state count if that judgement rests on a state law ground that is both "independent" of the merits of the Federal claim and an "adequate" basis for the court's decision.

489 U.S. at 260.

Because this determination may be made difficult by ambiguity in the state court's opinion the Supreme Court set forth the plain statement rule:

> Under Long, if "it fairly appears that the state court rested its decision primarily on federal law", this Court may reach the federal question on review unless the state court's opinion contains a "plain statement that [its] decision rests upon adequate and independent state grounds." Id. at 1042, 103 S.Ct. at 3477.

489 U.S. at 261. (emphasis supplied) The Hartley decision is clearly based on alternative grounds, both federal constitutional law and the state common law privilege against self-incrimination. 103 N.J. at 256, 260, 261, 263, 268, 271, 278, 279, 284, 285, 286; 511 A.2d at 82, 84, 85, 88, 90, 94, 97, 98 (1986). The Reed decision makes clear that a state court may reach and decide the federal question in the alternative to the state law question. However the decision on the federal question will not permit review by this Supreme Court when the state court's opinion contains a plain statement that its decision relies upon adequate and independent state grounds.

The Reed decision further explained that:

> A state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgement, even when the state court also relies on federal law. See Fox Film Corp. v. Muller, 296 U.S. 207, 210, 56 S.Ct. 183, 194, 80 L.Ed. 158 (1935).

489 at 264 n.10. (emphasis supplied) In this case, as in Hartley, the State Supreme Court reached the merits of the federal claim in an alternative holding. 121 N.J. at 421, 581 A.2d at 489 (App. A. at 12) The prosecutor is asking this Court to refuse to honor a state court holding based on state law by asserting that the holding is a sham and is incorrect as a matter of state law. Such a request defeats the purpose of the plain statement rule because it would require the federal court to conclude that the state supreme court erred on the state law issue before deciding to consider the federal Constitutional issue. This court in Long stated that the plain statement rule would "obviate in most instances the need to examine state law in order to decide the nature of the state court decision." 463 U.S. at 1042.

A recent decision of the Fifth Circuit premised on Michigan v. Long in a capital murder case supports respondent's argument. In Russell v. Lynaugh, 892 F.2d 1205 (5th Cir. 1989), the court held that

> [r]espect for the independence of state courts has been one of the primary cornerstones for the refusal of federal courts to decide cases where there is an adequate and independent state ground.

> Michigan v. Long, 103 S.Ct. at 3476. We do not know how that Texas Court of Criminal Appeals could have been clearer in asserting an independent state ground as a basis for rejecting the Witherspoon claims in this case. To ignore this emphatically stated basis for the state court's ruling stated on three occasions in its ruling would certainly exhibit disrespect for the judgement of the state court and its right as an independent judiciary to apply its own constitutionally proper laws in deciding its own cases.

Id. at 1211. Respondent submits that the Hartley decision went to great lengths to be clear in its assertion that its decision was based on adequate and independent state grounds. The Hartley decision explicitly states that

> To the extent that we rely on Federal precedent in reaching our state law decision, we do so only for the purpose of guidance, recognizing that those precedents may not compel the result we reach today. See Michigan v. Long, 436 U.S. at 1041, 103 S.Ct. at 3476, 77 L.Ed. 2d at 1214.

121 N.J. at 286, 511 A.2d at 98. The New Jersey Court was clearly relying upon the direction of this court in Long that

> if a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgement or its opinion that the federal cases are being used only for the purpose of guidance and do not compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds were of course will not undertake to review that decision.

463 U.S. at 1042.[1] Respondent submits that observations of Russell v. Lynaugh, supra, decision regarding the exhibition of disrespect for the judgement of state courts can clearly be discerned in the prosecutor's petition, which reeks with disrespect for the New Jersey Supreme Court.

The prosecutor asserts that this case is North Carolina v. Butler, 441 U.S. 369 (1979), revisited. (SP 7) However, in that decision the North Carolina court did not rely upon state law but relied only upon the United States Constitution. The prosecutor neglects to mention the footnote which was appended to the portion of the opinion he quotes. This Court stated that, "By the same token this Court must accept whatever construction of a state constitution is placed upon it by the highest court of the state." Id. at 377, n.7.[2] This footnote is consistent with numerous decisions that have held that the United States Supreme Court will accept the ruling of a state's highest court as to

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[1] Prior to the court's decision in Hartley, N.J. Supreme Court Justice Stewart Pollock in an article concerning the Michigan v. Long, decision concluded that "[t]o avoid Supreme Court review of a decision based on its state constitution, a state court discussing federal law must make a plain statement that it used federal law for guidance only". Pollock, "Adequate and Independent State Grounds as a Means of Balancing The Relationship between State and Federal Courts' 63 Tex. L Rev. 977, 999 (1985) Justice Pollock relied upon an opinion of the New Hampshire Supreme Court State v. Ball 124 N.H. 226, 471 A.2d 347 (1983 and an opinion of the Rhode Island Supreme Court concerning which this Court denied the state's petition for certiorari. State v. Von Bulow, 475 A.2d 995 (R.I. 1984) cert. denied 469 U.S. 875 (1984)

[2] Respondent also notes that the Supreme Court of Pennsylvania has, pursuant to its supervisory powers and based on its interpretation of the Pennsylvania Constitution, refused to follow North Carolina v. Butler, in Commonwealth v. Busey, 486 Pa. 221, 404 A.2d 1309, 1314 (1979).

interpretations of state law. Justice O'Connor, sitting as a Circuit Justice, has recently observed in California v. Freeman, ____ U.S. ____, ____, 109 S.Ct. 854, 856 (1989), that:

> interpretations of state law by a state's highest court are, of course, binding upon this Court. O'Brien v. Skinner, 414 U.S. 524, 534, 94 S.Ct. 740, 743, 38 L.Ed.2d 762 (1974); Murdoch v. City of Memphis, 20 Wall. 590, 22 L.Ed. 429 (1875).[3]

Clearly, the prosecutor has filed the present petition in the hope that this Court would not agree with the Hartley decision's bright line requirement of fresh Miranda warnings whenever police commence to reinterrogate a suspect who has previously invoked his right to remain silent. Even if one assumes the prosecutor is correct, a contrary ruling by this Court would not require the New Jersey Supreme Court to alter its ruling based on state law. The New Jersey Supreme Court "has frequently resorted to [its] own state constitution in order to afford [its] citizens broader protection of certain personal rights than that afforded by analogous or identical provisions of the federal Constitution." State v. Novembrino, 105 N.J. 95, 145, 519 A.2d 820, 849 (1987). There can be no dispute that:

> A state is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards. See, e.g., Cooper v. California, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 LEd.2d 730 (1967); Sibron v. New York, 392 U.s. 40,

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[3] This court subsequently denied the petition for certiorari ____ U.S. _____ 109 S.Ct. 1133 (1989) and denied a motion for rehearing, ____ U.S. ____ 109 S.Ct. 1660 (1989).

60-61, 88 S.Ct. 1884, 1901-1902, 20 L.Ed.2d 417 (1968).

Oregon v. Hass, 420 U.S. 714, 720 (1975) (emphasis in original). This Court in California v. Ramos, 463 U.S. 992, 1015 (1983), noted that "[it] is elementary that states are free to provide greater protections in their criminal justice systems than the federal Constitution requires."[4] See also Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 82 (1979); Lego v. Twomey, 404 U.S. 477, 489 (1972); Cooper v. California, 368 U.S. 58, 62 (1967). With regard to such state court decisions, former Justice William Brennan has written:

> the State decisions not only cannot be overturned by, they indeed are not even reviewable by the Supreme Court of the United States.
>
> We are utterly without jurisdiction to review such decisions. The Supreme Court's jurisdiction over state cases is limited to the correction of errors related solely to questions of federal law: it cannot review state court determinations of state law even when the case also involves federal issues. Murdock v. City of Memphis, 87 U.S. (20 Wall) 590 (1875). Moreover, if a state ground is independent and adequate to support a judgment, the Court has no jurisdiction at all despite the presence of a federal issue.

Brennan, "State Constitutions and the Protections of Individual Rights," 90 Harv. L.Rev. 489, 501, n.80 (1977). See also International Longshoreman's Ass'n v. Davis, 467 U.S. 380, 388 (1986).

If this Court was to grant certiorari and overrule the New Jersey Supreme Court's ruling based on federal constitutional

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[4] Defendant notes that the California Supreme did so when it decided the case on remand. People v. Ramos, 37 Cal. 3d 136, 207 Cal. Rptr. 800, 689 P.2d 430 (1984).

law, the decision as to application of state law would still stand. This Court would have issued an advisory opinion. On remand the New Jersey court would reverse the conviction on the basis of the New Jersey common law right against self-incrimination. "This is precisely the result that the doctrine of adequate and independent state grounds seeks to avoid." California v. Freeman, ____ U.S. at ____ 109 S.Ct. at 856. Justice O'Connor in the Freeman decision, Justice Brennan in the above cited article and the Michigan v. Long opinion, 463 U.S. at 1043, all rely upon Herb v. Pitcairn, 324 U.S. 117, 126 (1945), for the proposition that the United States Supreme Court should not render advisory opinions by correcting a state court's view of federal law when the same judgment would be rendered on the basis of state law.

The prosecutor's argument that Hartley created the New Jersey common law privilege against self-incrimination upon a misinterpretation of federal law is meritless. As explained in a concurring opinion to this Court's decision in New Jersey v. Portash, 440 U.S. 450, 461 (1979) (Brennan, J., concurring):

> The privilege against self-incrimination is not set out in the New Jersey Constitution. Its origins are instead to be found in the common law, see State v. Fary, 19 N.J. 431, 434-435, 117 A.2d 499, 501-502 (1955), and in statutes. See N.J.Stat.Ann. sec. 2A:84A-19 (West 1976). Although New Jersey courts have looked to constructions of the Fifth Amendment of the Federal Constitution as a source of illumination for the interpretation of the state privilege, see In re Pillo, 11 N.J. 8, 15-17, 93 A.2d 176, 179-180 (1952), they have also held that the interpretation of that privilege is "a

> matter of state law and policy, as to which [New Jersey] may impose standards more strict than required by the federal Constitution, which standards will control regardless of the final outcome of the question in the federal sphere." State v. Deatore, 70 N.J. 100, 112, 358 A.2d 163, 170 (1976). Cf. State v. Johnson, 68 N.J. 349, 353, 346 A.2d 66, 67-68 (1975).

The prosecutor's contention that the Supreme Court of New Jersey has endeavored to alter federal constitutional law is clearly erroneous. The New Jersey Supreme Court's resolution of that issue, while it surely may be considered persuasive, is not binding on any federal court or court of another state. New Jersey's highest tribunal has considered the prosecutor's argument that the rule established in Hartley will lead to "societally counterproductive results" and has rejected it as a matter of state law. No pressing question of federal law requires that this case be reviewed by the United States Supreme Court.

The prosecutor's efforts to strip the New Jersey Supreme Court of its sovereign authority to protect the rights of its citizens on basis of its interpretation of state law must be rejected. Strong reasons for this have been set forth by Justice Stewart Pollock:

> Deference by the United States Supreme Court to state court decisions based on state law has become an integral part of federal jurisprudence. This principle is crucial also to the vitality of the partnership between state and federal courts. By respecting such judgments, the high court honors state courts as partners in the federalist system especially when the federal

constitution would lead to a different result.

Pollock, supra, 63 Tex. L.Rev. at 980. Therefore, as in Township of Mount Laurel v. Southern Burlington County NAACP, 423 U.S. 808 (1975), the petition should be denied "for want of jurisdiction." Id. In that case this Court declined to review Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), which was decided on the basis of the New Jersey state constitutional requirements of substantive due process and equal protection of the laws.

II THE NEW JERSEY SUPREME COURT CORRECTLY DETERMINED AS A MATTER OF FEDERAL LAW THAT MR. HARVEY'S CONFESSION WAS UNCONSTITUTIONALLY OBTAINED DUE TO THE FAILURE OF THE POLICE TO SCRUPULOUSLY HONOR HIS REQUESTS TO REMAIN SILENT.

The use of Mr. Harvey's oral confessions and statements at trial violated his fundamental right not to be compelled to be a witness against himself, as they were obtained after police failed to scrupulously honor his assertion of his right to remain silent. U.S. Const. Amend. V; U.S. Const. Amend. XIV; Miranda v. Arizona, 384 U.S. 436 (1966); Michigan v. Mosley, 423 U.S. 96 (1986).

The New Jersey Supreme Court's decision in this case as was its decisions in State v. Hartley, 103 N.J. 252, 511 A.2d 80 (1986), State v. Bey, 122 N.J. 45, 548 A.2d 846 (1988) (Bey I) and State v. Bey, 112 N.J. 123, 548 A.2d 887 (1988) (Bey II), is a correct application of Michigan v. Mosley, 423 U.S. 96 (1975). The police in this case failed to scrupulously honor Mr. Harvey's requests to remain silent. Therefore, his confession must be suppressed. There is no need for this Court to grant the prosecutor's petition to review a decision squarely premised on this Court's decision in Michigan v. Mosley. The New Jersey Supreme Court in this case has not decided an important question of federal law which has not been, but should be settled by the United States Supreme Court. Nor has it decided a federal question in a way that conflicts with applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, respondents submit that this Court should deny petitioner's petition for a writ of certiorari.

Respectfully submitted,

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DATED: February 11, 1991